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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JAMES P. CHASSE, JR., et al.,))	
Plaintiffs,))	
v.))	No. CV-07-189-HU
CHRISTOPHER HUMPHREYS, et al.,))	
Defendants.))	OPINION & ORDER

Tom Steenson
STEENSON, SCHUMANN, TEWKSBURTY, CREIGHTON & ROSE, P.C.
500 Yamhill Plaza Building
815 S.W. Second Avenue
Portland, Oregon 97204

Attorney for Plaintiffs

James G. Rice
DEPUTY CITY ATTORNEY
David A. Landrum
DEPUTY CITY ATTORNEY
OFFICE OF CITY ATTORNEY
1221 S.W. Fourth Avenue, Room 430
Portland, Oregon 97204

Attorneys for City Defendants

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/ / /
/ / /

1 - OPINION & ORDER

1 Agnes Sowle
COUNTY ATTORNEY
2 Susan M. Dunaway
ASSISTANT COUNTY ATTORNEY
3 501 S.E. Hawthorne Blvd., Suite 500
Portland, Oregon 97214-3587

4
5 Robert E. Barton
COSGRAVE VERGEER KESTER, LLP
805 S.W. Broadway
6 Portland, Oregon 97205

7 Attorneys for Bret Burton & Multnomah County

8 James P. Martin
Kari A. Furnanz
9 HOFFMAN HART & WAGNER, LLP
1000 S.W. Broadway, Twentieth Floor
10 Portland, Oregon 97205

11 Attorneys for Sokunthy Eath & Patricia Gayman

12 James L. Dumas
Sheri C. Browning
13 LINDSAY, HART, NEIL, & WEIGLER LLP
1300 S.W. Fifth Avenue, Suite 3400
14 Portland, Oregon 97201

15 Attorneys for AMR Defendants

16 KING, District Judge:

17 In this civil rights action, plaintiffs bring several claims
18 against various groups of defendants, including the City Defendants
19 (Humphreys, Nice, City of Portland, Tri-Met, Potter & Sizer), the
20 County Defendants (Burton & Multnomah County), the County Nurses
21 (Eath & Gayman)¹, and the AMR Defendants (AMR, Stucker, and
22 Hergert). The claims arise from a September 17, 2006 incident in
23 which James P. Chasse, Jr. (Chasse), died in police custody.

24 All of the parties have moved for summary judgment as to
25 certain claims. As a result of previous orders, there are only
26

27
28 ¹ The County Defendants and the County Nurses were
dismissed from the case on August 17, 2009.

1 certain parts of some motions presently requiring resolution.
2 Those are: (1) the motion by Humphreys and Nice against
3 plaintiffs' Equal Protection claim; (2) the motion by plaintiffs
4 against the AMR Defendants' affirmative defenses; and (3) the
5 motion by Hergert and Stucker as to some of plaintiffs' claims.
6 This Opinion & Order addresses only the motion by Humphreys and
7 Nice as to the Equal Protection claim. The cross-motions between
8 plaintiffs and the AMR Defendants will be addressed separately, at
9 a later date.

10 STANDARDS

11 Summary judgment is appropriate if there is no genuine issue
12 of material fact and the moving party is entitled to judgment as a
13 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
14 initial responsibility of informing the court of the basis of its
15 motion, and identifying those portions of "'pleadings, depositions,
16 answers to interrogatories, and admissions on file, together with
17 the affidavits, if any,' which it believes demonstrate the absence
18 of a genuine issue of material fact." Celotex Corp. v. Catrett,
19 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

20 "If the moving party meets its initial burden of showing 'the
21 absence of a material and triable issue of fact,' 'the burden then
22 moves to the opposing party, who must present significant probative
23 evidence tending to support its claim or defense.'" Intel Corp. v.
24 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
25 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
26 Cir. 1987)). The nonmoving party must go beyond the pleadings and
27 designate facts showing an issue for trial. Celotex, 477 U.S. at
28 322-23.

1 The substantive law governing a claim determines whether a
2 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
3 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
4 to the existence of a genuine issue of fact must be resolved
5 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
6 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
7 drawn from the facts in the light most favorable to the nonmoving
8 party. T.W. Elec. Serv., 809 F.2d at 630-31.

9 If the factual context makes the nonmoving party's claim as to
10 the existence of a material issue of fact implausible, that party
11 must come forward with more persuasive evidence to support his
12 claim than would otherwise be necessary. Id.; In re Agricultural
13 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
14 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
15 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

16 DISCUSSION

17 In their Fifth Claim for Relief, plaintiffs allege that
18 Humphreys and Nice violated Chasse's Fourteenth Amendment rights
19 because they discriminated against him, or caused the
20 discrimination against him, on the basis that he was mentally ill
21 or perceived to be mentally ill. Am. Compl. at ¶ 106.

22 The Equal Protection Clause provides that no state shall "deny
23 to any person within its jurisdiction the equal protection of the
24 laws." U.S. Const. amend XIV, § 1. As the Supreme Court has
25 noted, this "is essentially a direction that all persons similarly
26 situated should be treated alike." City of Cleburne, Tex. v.
27 Cleburne Living Center, 473 U.S. 432, 439 (1985); see also
28 Merrifield v. Lockyer, 547 F.3d 978, 992 (9th Cir. 2008) (Equal

1 Protection Clause requires that similarly situated persons be
2 treated equally).

3 Because the Equal Protection Clause protects against
4 classification-based discrimination, the issue in many equal
5 protection claims is whether a governmental policy or practice
6 contains inappropriate classifications. See Clark v. Jeter, 486
7 U.S. 456, 461 (1988) (in equal protection clause analysis, courts
8 look at different types of government classification and apply
9 different levels of scrutiny in evaluating constitutionality of
10 such classifications); see also Martin v. California Dep't of
11 Veterans Affairs, 560 F.3d 1042, 1049 (9th Cir. 2009) ("A
12 governmental policy that purposefully treats the disabled
13 differently from the non-disabled need only be rationally related
14 to legitimate legislative goals to pass constitutional muster.")
15 (quoting Lee v. City of Los Angeles, 250 F.3d 668, 687 (9th Cir.
16 2001)).

17 In the claim at issue in this motion, however, the allegation
18 against Humphreys and Nice does not involve a government policy
19 classification. Plaintiffs do not contend, as to these individual
20 defendants, that they acted pursuant to an unconstitutional policy
21 or practice. Rather, the claim is that Humphreys and Nice engaged
22 in certain conduct directed at Chasse (for example, choosing to
23 stop him, chasing him, tackling him, failing to send him to the
24 hospital in an ambulance from NW Everett and NW 13th, failing to
25 obtain prompt medical attention for him at the jail, and then
26 driving Chasse to Portland Adventist instead of a closer hospital),
27 because of his mental illness.

28 While not labeled as such by the parties, I view this as a

1 selective enforcement claim. That is, Humphreys and Nice allegedly
2 chose to question Chasse and then engage in the other conduct
3 described above, because he was mentally ill and would not have
4 done so but for his mental illness. This is no different from the
5 selective enforcement or prosecution claims which allege that the
6 police stopped someone because of his or her race.

7 To prevail on this equal protection claim against the
8 individual City police officers, plaintiffs must show that
9 Humphreys's and Nice's conduct had a discriminatory effect and that
10 they possessed a discriminatory motive. Rosenbaum v. City & County
11 of San Francisco, 484 F.3d 1142, 1152 (9th Cir. 2007); see also
12 Wayte v. United States, 470 U.S. 598, 608 (1985) (standards for
13 selective prosecution claims require a showing of both a
14 discriminatory effect and motivation by a discriminatory purpose);
15 Farm Labor Organizing Comm. v. Ohio State Highway Patrol, 308 F.3d
16 523, 534 (6th Cir. 2002) (noting that "a claimant alleging
17 selective enforcement of facially neutral criminal laws must
18 demonstrate that the challenged law enforcement practice 'had a
19 discriminatory effect and that it was motivated by a discriminatory
20 purpose[;]' further noting that this analytical framework has been
21 applied in the Sixth and other circuits in cases involving
22 allegations of discriminatory police enforcement practices)
23 (quoting Wayte, 470 U.S. at 608).

24 To establish discriminatory effect, plaintiffs must show that
25 similarly situated individuals were treated differently. United
26 States v. Armstrong, 517 U.S. 456, 465 (1996). In the context of
27 the instant claim, plaintiffs must show that similarly situated
28 individuals who were not mentally ill, were not subject to the

1 offensive conduct. As discussed below, plaintiffs here fail to
2 make that showing, or to create a genuine issue of fact precluding
3 summary judgment, on the discriminatory effect prong of the
4 analysis.

5 In the City Defendants' memorandum in support of the motion,
6 the City Defendants raise several arguments, including that
7 "plaintiffs have failed to establish an essential element of a
8 prima facie equal protection discrimination case: That Chasse was
9 treated differently than similarly situated citizens who were not
10 living with mental illness." City Defts' Mem. at p. 11. The City
11 Defendants further argue that there is no evidence that Humphreys
12 and Nice intended to treat Chasse differently than others similarly
13 situated based on his mental illness because Humphreys and Nice had
14 not seen Chasse before September 17, 2006, and did not know that he
15 was mentally ill.

16 In response, plaintiffs put forth evidence and argument on the
17 knowledge and intent issue. They fail to address the
18 discriminatory effect element.

19 Nonetheless, in liberally reading plaintiffs' opposition
20 memorandum, I have found three assertions that could possibly
21 suggest an issue of fact about Humphreys's and Nice's, or the
22 Portland Police Bureau's, treatment of others. The record,
23 however, is insufficient to preclude summary judgment.

24 First, at page fifteen, footnote ten of their memorandum,
25 plaintiffs assert that when Humphreys first spotted Chasse at
26 Northwest 18th Avenue, "Nice was attending to a stumbling, falling
27 down, apparently not mentally ill drunk, who he allowed to walk
28 home rather than arrest for being drunk in public or taking him to

1 a detox center, as Nice could have." Pltfs' Mem. at p. 15 n.10.

2 In support of this assertion, plaintiffs cite to their Concise
3 Statement of Facts (CSF) at ¶¶ 6 and 10.² Paragraph 6 asserts that
4 "At 5:09 p.m. . . ., Humphreys and Burton parked at NW 18th &
5 Everett to assist Nice with an intoxicated person who had stumbled
6 and fallen." Pltfs' CSF at ¶ 6 (dkt #709). In support of this
7 statement, plaintiffs cite to "Id., pp. 3-4, PE 7, p 3." Id.

8 Because I interpret a cite to "Id." as a cite to the
9 immediately preceding cited material, I understand the "Id." at the
10 end of paragraph 6 to refer to the previously cited exhibit. In
11 this instance, there are five exhibits cited at the end of
12 plaintiffs' asserted fact in paragraph five. This creates an
13 unnecessary burden on the Court. I have no idea which of these
14 five exhibits plaintiffs rely on for the asserted fact in paragraph
15 six. Thus, I have looked at all five of the exhibits, which are
16 Plaintiffs' Exhibits 6, 9, 6 (under seal), 49 (under seal), and 50
17 (under seal). Notably, none of the them contain pages 3-4, and
18 none of them support the asserted fact.

19 Plaintiffs also cite to Plaintiffs' Exhibit 7. There is no
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21 ² Plaintiffs originally submitted two separate fact
22 statements, one filed under seal (dkt #715), and the other filed
23 for public access (dkt #709). The two filings created
24 unnecessary confusion for the Court. As a result, I asked
25 plaintiffs to merge or "blend" the two documents into one, and to
26 submit a judge's copy to the Court, and provide one to opposing
27 counsel. Unfortunately, the timing of this request and the
28 delivery to opposing counsel was too late for opposing counsel to
be assisted by it. Thus, I have relied on the fact statements as
originally filed. In the future, I request that plaintiffs
simply file one document and if it contains material which should
be filed under seal, the entire document should be filed under
seal.

1 Plaintiffs' Exhibit 7 in this summary judgment record. See
2 Steenson Declr. in Opp. to Motion for SJ (dkt #710) at page 2
3 (stating that Plaintiffs' Exhibit 7 is "Not Submitted."). The
4 citations for the asserted fact in plaintiffs' paragraph six do not
5 support the assertion. Moreover, the asserted fact states only
6 that Nice was with an intoxicated person who had stumbled and
7 fallen. This alone does not supply an adequate comparator. The
8 asserted fact does not indicate that the intoxicated person was not
9 mentally ill. Thus, even if there were evidence in this summary
10 judgment record to support the asserted fact, the asserted fact is
11 insufficient evidence of Humphreys's and Nice's different treatment
12 of a similarly situated person.

13 The other citation in plaintiffs' memorandum in support of
14 their assertion that Nice treated the intoxicated person
15 differently, is to plaintiffs' paragraph ten. There, plaintiffs
16 assert, in relevant part, that "[a]fter Nice let the intoxicated
17 person walk home," Pltfs' CSF at ¶ 10 (dkt #709). In
18 support of this assertion, plaintiffs cite to Plaintiffs' Exhibit
19 4, at pages 4 and 8. Id.

20 Plaintiffs' Exhibit 4 is an excerpt of a transcript of a
21 statement Humphreys made a few days after the Chasse incident. It
22 is not paginated. On what I count as pages four and eight, there
23 is no testimony by Humphreys about Nice having let an intoxicated
24 person walk home. On the transcript's internally labeled page
25 four, there is some testimony about the intoxicated person, but it
26 is crossed out. It is still legible, however, and states that Nice
27 was contacting a visibly intoxicated subject, that the intoxicated
28 subject Nice was contacting was seated on the stairs, and Nice was

1 talking to him. Pltfs' Exh. 4. There is nothing more about the
2 person on the page. On the transcript's internally labeled page
3 eight, no statements about the intoxicated person appear. As with
4 the other citations in support of plaintiffs' assertion that the
5 individual officers treated a similarly situated non-mentally ill
6 person differently, the citation to Plaintiffs' Exhibit 4 does not
7 support the assertion. Plaintiffs fail to create an issue of fact
8 on the "discriminatory effect" prong of the analysis with the
9 assertion based on allegedly different treatment of an intoxicated,
10 allegedly non-mentally ill subject.

11 The next possible statement by plaintiffs that could suggest
12 different treatment of similarly situated non-mentally ill persons,
13 is plaintiffs' argument that Humphreys's use of a "spit sock" on
14 Chasse could be viewed by the jury as evidence of discriminatory
15 intent "given that there is no evidence of spit socks being used by
16 the [Portland Police Bureau] PPB under any other circumstances."
17 Pltfs' Mem. at p. 18.

18 Although plaintiffs make this argument in support of the
19 discriminatory motive prong of the selective enforcement analysis,
20 I have considered it as to the discriminatory effect prong as well.
21 However, plaintiffs cite to no evidence in the record supporting
22 this statement and I have found no facts in either of plaintiffs'
23 fact statements (dkt #s 709, 715) mentioning the PPB's use, or non-
24 use, of spit socks. Thus, this assertion is completely
25 unsupported.

26 The third possible statement by plaintiffs that could support
27 their burden on the discriminatory effect issue, is the assertion,
28 again made by plaintiffs on the discriminatory intent part of the

1 analysis, that Nice instructed the attending paramedic at NW 13th
2 and Everett, to get Humphreys to sign a "transport refusal form"
3 provided by the paramedics, and that this "was the first and only
4 know[n] occasion on which such a form has been signed by an
5 officer." Pltfs' Mem. at p. 19. In support, plaintiffs cite to
6 "Id.", and "Id., ¶ 38." Id. I assume the "Id." citation refers to
7 plaintiffs' fact statement, the previous non-Id. cite at the
8 conclusion of the preceding paragraph. Plaintiffs' fact statement,
9 at paragraph thirty-eight, asserts that "[n]o PPB officer has
10 signed or been asked to sign an 'Info Form' like Humphreys did."
11 Pltfs' CSF at ¶ 38 (dkt #709). In support, plaintiffs cite to
12 Plaintiffs' Exhibit 59, at pages 56-57.

13 Plaintiffs' Exhibit 59 is an excerpt from the deposition
14 testimony of Jose E. Gonzalez. Aside from the discrepancy between
15 the assertion in the memorandum of the form in question being a
16 "transport refusal form," and the form noted in the fact statement
17 as being an "Info Form," the testimony does not support the
18 assertion.

19 Steenson identifies the exhibit as being the excerpts of
20 deposition testimony of PPB Sergeant Jose Gonzalez. Steenson
21 Declr. at p. 5 (Dkt #710). The deposition excerpt itself includes
22 no identifying information about Gonzalez and no information about
23 his duties. The cited excerpt includes a statement by Gonzalez
24 that he received a "Contact report" from Humphreys. Gonzalez does
25 not refer to it as an "Info Form," or a "transport refusal form."
26 He states that he received from Humphreys an emergency medical
27 service information form in the name of John Doe that was signed
28 with an unknown signature. Pltfs' Exh. 59 at p. 56. Gonzalez gave

1 the form to the detective. Id. He testified that he had never
2 seen a form like that before, that he had never signed a form like
3 that before, and that he had not seen an officer sign a form like
4 that before. Id. at pp. 56-57. He also testified that he had not
5 heard of emergency medical personnel asking or giving such a form
6 to an officer to sign. Id. at p. 57.

7 While this testimony establishes that the alleged use of the
8 form (whichever form it actually is) in this manner is unfamiliar
9 to Gonzalez, this testimony does not support plaintiffs' assertion
10 that no PPB officer has signed or been asked to sign an "Info Form"
11 like Humphreys did. Plaintiffs' assertion simply goes too far.

12 In summary, on the discriminatory effect part of the selective
13 enforcement equal protection analysis, plaintiffs fail to create a
14 question of fact on the issue of whether Humphreys and Nice treated
15 similarly situated, non-mentally ill, individuals differently.
16 Plaintiffs' memorandum omits any argument on the issue and while I
17 have attempted to glean some possible assertions in plaintiffs'
18 memorandum that might be relevant to this issue, the factual record
19 fails to support the assertions.

20 Because of my conclusion on discriminatory effect, I need not
21 address the discriminatory intent prong of the analysis. Even if
22 plaintiffs created an issue of fact regarding what Humphreys or
23 Nice knew of or learned regarding Chasse's mental illness on
24 September 17, 2006, and even if that knowledge and other evidence
25 in the record created a question of fact on the issue of
26 Humphreys's or Nice's discriminatory intent or motive, Humphreys
27 and Nice are entitled to summary judgment on the equal protection
28 claim based on plaintiffs' failure to create an issue of fact

1 regarding discriminatory effect.

2 CONCLUSION

3 I grant Humphreys's and Nice's summary judgment motion (#640)
4 on plaintiffs' equal protection claim.

5 IT IS SO ORDERED.

6 Dated this ____1st____day of September, 2009.

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/s/ Garr M. King
Garr M. King
United States District Judge

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